

United States Court of Appeals for the Fifth Circuit

15-11094

United States of America,
Plaintiff-Appellee,

v.

Rodger Jack DePute,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
Fort Worth Division

Appellant's Initial Brief

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Certificate of Interested Persons

The number and style of the case in the court below is as follows - *United States of America v. Rodger Jack DePute*, cause number 4:15-CR-121-O, in the United States District Court for the Northern District of Texas, Fort Worth Division.

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualifications or recusal.

Federal District Judge: Hon. Reed C. O'Connor

Magistrate Judges: Hon. Jeffrey L. Cureton

Appellant: Rodger Jack DePute

Federal Public Defender: Jason D. Hawkins (appeal)

Assistant Federal Public Defender: Michael Lehmann
(district court)

United States Attorney: John R. Parker

Assistant United States Attorney: Wes Hendrix (appeal)

Aisha Saleem (district court)

Statement Regarding Oral Argument

Oral argument is not necessary in this case. The issue presented was previously decided in *United States v. Groce*, 784 F.3d 291 (5th Cir. 2015). There remains a split amongst the circuits however, and Mr. DePute wants to preserve the issue for possible further review.

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Statement of Jurisdiction

The district court had jurisdiction over this matter pursuant to 18 U.S.C. § 3231. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1291, as this is an appeal from a final judgment entered by the United States District Court for the Northern District of Texas. Jurisdiction is also invoked pursuant to 18 U.S.C. § 3742.

Written judgment was entered by the district court on October 21, 2015. A timely notice of appeal was filed November 3, 2015.

Statement of the Issue Presented for Review

Did the district court reversibly err when it applied the enhancement under U.S.S.G. § 2G2.2(b)(3)(B)?

The issue presented was previously decided in *United States v. Groce*, 784 F.3d 291 (5th Cir. 2015). There remains a split amongst the circuits however, and Mr. DePute wants to preserve the issue for possible further review.

Statement of the Case

Mr. DePute pleaded guilty to a single count of possession of a visual depiction of a minor engaged in sexually explicit conduct in violation of 18 U.S.C. § 2252(a)(2). This appeal focuses on one particular guideline enhancement: guideline 2G2.2 imposes a five-level enhancement if the defendant's offense involves "distribution for the receipt, or expectation of receipt, of a thing of value."¹ The issue presented was previously decided in *United States v. Groce*, 784 F.3d 291 (5th Cir. 2015). There remains a split amongst the circuits however, and Mr. DePute wants to preserve the issue for possible further review.

Officers learned about Mr. Depute when they were investigating peer-to-peer ("P2P") networks.² P2P networks allow users to search other users' shared files and to download files from other users' computers. By searching the network for suspected child pornography files, officers found files that were available from an IP address later linked to Mr. Depute.³ On October 29, 2007, FBI agents downloaded twelve child pornography files from Mr. Depute's computer.⁴

¹ USSG § 2G2.2(b)(3)(B).

² (ROA.86)

³ (ROA.87)

⁴ (ROA.86)

Officers eventually decided to search for Mr. Depute and located him on April 9, 2008.⁵ Mr. Depute admitted that he had used a P2P programs named Limewire to locate and download child pornography files.⁶ He further understood that others were able to share files from his own computer through those programs.⁷ Officers seized Mr. Depute's computer that day, and they arrested him on May 19, 2015.⁸

Mr. DePute pleaded guilty to receipt of child pornography on November 18, 2009.⁹ Probation prepared a presentence report (PSR) that recommended the following offense-level calculations:

Base offense level	18	2G2.2(a)(1)
Minor under age 12	+2	2G2.2(b)(2)
Distribution for receipt of thing of value or with expectation of receipt of thing of value	+5	2G2.2(b)(3)(B)
Sadistic or masochistic conduct	+4	2G2.2(b)(4)

⁵ (ROA.88)

⁶ (ROA.88)

⁷ (ROA.88)

⁸ (ROA.90)

⁹ (ROA.86)

Use of computer	+2	2G2.2(b)(6)
600 or more images (or video equivalent)	+5	2G2.2(b)(7)(D)
<u>Acceptance of responsibility</u>	<u>-3</u>	<u>3E1.1</u>
Total Offense Level	33 ¹⁰	

Coupling offense level 37 with a criminal history category of I (because Mr. Depute had no previous arrests or convictions), the PSR reported that Mr. Depute's guideline range was 135 to 168 months of incarceration. The statutory maximum was 120 months so the guideline range then became 120 months incarceration.¹¹

Mr. DePute raised one objection: he argued that the five-level enhancement for distribution in exchange for something of value was inappropriate.¹² He first argued that downloading images from a P2P network into a "shared" folder, where they would be accessible to other users, was not active "distribution" under guideline 2G2.2.¹³ Alternatively, he argued that even if his conduct did amount to "distribution," that the five-level enhancement should not apply because on a typical P2P network, there is no quid-pro-quo, bartering, trading, or otherwise

¹⁰ (ROA.92)

¹¹ (ROA.101)

¹² (ROA.106)

¹³ (ROA.106)

distributing something in return for something of value.¹⁴ Mr. Depute did acknowledge however, that this Court had held against this position in *United States v. Groce*, 784 F.3d 291, 294-295 (5th Cir. 2015).¹⁵

The district court overruled Mr. DePute's objection and adopted the PSR's guideline calculations.¹⁶ Based upon the guidelines and citing the factors of 18 U.S.C. § 3553(a) the court imposed a guidelines sentence of 120 months in prison, followed by a five year term of supervised release.¹⁷ This appeal follows.

¹⁴ (ROA.106)

¹⁵ (ROA.106)

¹⁶ (ROA.74)

¹⁷ (ROA.78)

Summary of the Argument

The district court reversibly erred when it applied a five-level enhancement under U.S.S.G. § 2G2.2(b)(3)(B). Mr. DePute did not distribute his files *for* any benefit or expectation of benefit. He did not gain anything or have reason to believe that he would gain anything out of sharing the files. Thus, the district court committed procedural error when it applied the enhancement.

The issue presented was previously decided against Mr. DePute in *United States v. Groce*, 784 F.3d 291 (5th Cir. 2015). There remains a split amongst the circuits however, and Mr. DePute wants to preserve the issue for possible further review.

Argument

The district court reversibly erred when it applied the five-level enhancement under U.S.S.G. § 2G2.2(b)(3)(B).

This argument is foreclosed by *United States v. Groce*, 784 F.3d 291 (5th Cir. 2015).

Standard of Review

First, the Court must determine whether the district court committed any procedural error.¹⁸ If it did, the Court applies a harmless error test.¹⁹ The government carries the burden of proving harmlessness; it “must point to evidence in the record that will convince us that the district court had a particular sentence in mind and would have imposed it, notwithstanding the error made in arriving at the defendant’s guideline range.”²⁰ In a sentencing appeal,

the harmless error doctrine applies only if the proponent of the sentence convincingly demonstrates both (1) that the district court would have imposed the same sentence had it not made the error, and (2) that it would have done so for the same reasons it gave at the prior sentencing.²¹

This is a “high hurdle.”²²

¹⁸ *United States v. Delgado-Martinez*, 564 F.3d 750, 753 (5th Cir.2009).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *United States v. Ibarra-Luna*, 628 F.3d 712, 713-14 (5th Cir. 2010)

²² *Id.* at 714.

Discussion

Guideline § 2G2.2(b)(3)(B) instructs the court, when a child pornography offense involves “distribution *for the receipt or expectation of receipt*, of a thing of value, but not for pecuniary gain,” to “increase” the offense level “by 5 levels.”²³ This enhancement is further defined, in Application Note 1 as, “any transaction, including bartering or other in-kind transaction, that is conducted for a thing of value, but not for profit.” It is further noted that a “thing of value” is anything of valuable consideration.²⁴ An example is then provided that, in the case of bartering for child pornographic material, the “thing of value” is the child pornographic material received in exchange for other child pornographic material bartered as consideration.²⁵

A. Mr. DePute’s distribution was neither “for the receipt,” nor “for . . . the expectation of receipt” of any “thing of value.”

The guidelines and case law demonstrate that for U.S.S.G. § 2G2.2(b)(3)(B) to apply, it is anticipated that the distributor will receive some “thing of value”. This “thing of value” is broadly defined. It might be some specific item, such as an image or video of child pornographic material children. It could also mean

²³ U.S.S.G. § 2G2.2(b)(3)(B) (emphasis added).

²⁴ U.S.S.G. § 2G2.2(b)(3)(B), Application Note 1.

²⁵ U.S.S.G. § 2G2.2(b)(3)(B), Application Note 1.

something even less tangible, such as the expectation of an invitation to a “chat room” showing the molestation of a child or a sexual encounter with a child.

In each case in which the enhancement properly applies, however, the perpetrator engages in a transaction—a specific act of distribution—*for the purpose* of receiving the benefit, or with the “expectation” that the benefit will flow *as a result* of his distribution. In the context of file-sharing, the typical defendant “distributes” his material only in the most passive sense—he collects and downloads files, and the program stores his files in a folder which happens to be accessible to other users (unless he has changed the default settings to make the folder inaccessible). The Tenth Circuit has persuasively explained why the enhancement does not automatically apply to all cases in which the defendant knowingly shared his files via a P2P program: “To apply the enhancement to every defendant who shares files on a peer-to-peer file-sharing network would be to disregard the connection between distribution and ‘thing of value’ in the provision’s requirement that ‘distribution [be] *for* the receipt, or expectation of receipt, of a thing of value.’”²⁶ The Tenth Circuit recognized that the Eighth Circuit adopted the government’s reading in *United States v. Griffin*,²⁷ but believed that the

²⁶ *United States v. Geiner*, 498 F.3d 1104, 1111 (10th Cir. 2007) (emphasis in original) (quoting U.S.S.G. § 2G2.2(b)(3)(B)).

²⁷ 482 F.3d at 1013.

Eighth Circuit’s reasoning gave too broad of an interpretation to the expectation language.²⁸

Geiner illustrates the proper circumstances in which the enhancement should apply. Like all P2P users, Geiner was free to collect and download images without sharing his own files.²⁹ In that case, the defendant did not merely make his files available in a shared folder. He first adjusted his settings where files would not be shared; but he later “configured his software to permit the sharing of his files *because he wanted to be able to download images at a faster speed.*”³⁰ Geiner believed that, by sharing files, he would receive a specific benefit—namely, faster download speed. The court held that the enhancement was appropriate only because of Geiner’s expectation that he would receive that particular benefit *because he shared his files.*³¹

Here, by contrast, the government could not show that Mr. DePute expected to receive any benefit at all from the sharing of his files. The PSR’s entire defense of the enhancement focused on Mr. DePute’s knowledge that others were downloading files from his computer.

²⁸ *Geiner*, 498 F.3d at 1111.

²⁹ *Geiner*, 498 F.3d at 1111.

³⁰ *Id.* at 1110 (emphasis added).

³¹ *Id.* at 1111.

Here, unlike in *Geiner*, there is no evidence that Mr. DePute believed he would receive anything of value (a) as a result of enabling his shared drive, or (b) as a result of any “transaction.” P2P programs permit someone to access others’ files without regard to whether he is sharing the files he downloads. Because the government did not provide any evidence relevant to Mr. Depute’s purpose in making the files available, it failed to discharge its burden of defending the enhancement. By applying the enhancement, the district court committed significant procedural error.

B. The Sentencing Error Here Was Not Harmless and the Court Should Remand for Resentencing.

Had Mr. Depute only received a two-level enhancement for “distribution” pursuant to U.S.S.G. § 2G2.2(b)(3)(F) instead of the five-level enhancement, his offense level would have been reduced from a 33 to a 30. The corresponding guideline range would be reduced from 135-168 months to 97-121 months. Because the guidelines range is the “starting point and initial benchmark,” the Court must remand the case for re-sentencing pursuant to the proper guidelines range.³²

³² See *Gall v. United States*, 552 U.S. 38, 49, 51 (2007).

Conclusion

For all the foregoing reasons, this Court should vacate the sentence in this case and remand for resentencing using the proper starting point of 97-121 months in determining the extent of the downward variance it would give in this case.

Respectfully submitted,

/s/ Jason D. Hawkins

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Certificate of Service

I, Jason D. Hawkins, hereby certify that on this the 9th day of March, 2016, this brief was served via ECF and by separate email to counsel for the Plaintiff-Appellee, Assistant U.S. Attorney Wes Hendrix. I further certify that: 1) all privacy redactions have been made pursuant to 5th Cir. Rule 25.2.13; 2) the electronic submission is an exact copy of the paper documents pursuant to 5th Cir. Rule 25.2.1; and 3) the document has been scanned for viruses with the most recent version of Norton Anti-virus and is free of viruses. Further I certify that I will send a paper copy via regular mail to Roger DePute.

/s/ Jason D. Hawkins

Certificate of Compliance

Pursuant to Rule 32(a)(7) of the Federal Rules of Appellate Procedure, the undersigned certifies this brief complies with the type-volume limitations announced in Rule 32(a)(7)(B)(I) of the Federal Rules of Appellate Procedure.

1. Exclusive of the exempted portions announced in Rule 32 of the Federal Rules of Appellate Procedure and 5th Circuit Rule 32.2, the undersigned certifies that the Initial Brief contains fewer than 30 pages in proportionately spaced typeface.
2. The brief has been prepared in proportionately spaced typeface using WordPerfect X4, Garamond 14 pt. Footnotes are in Garamond 12 pt.
3. The undersigned understand a material misrepresentation in completing this certificate, or circumvention of the type-volume limits states in Rule 32(a)(7) of the Federal Rules of Appellate Procedure, may result in the Court striking the brief and imposing sanctions against the person signing the brief.

/s/Jason D. Hawkins